Government of the District of Columbia

Office of the Attorney General

Testimony of
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Public Hearing on Bill 16-138 Electronic Recording Procedures and Penalties Act of 2005

Committee on the Judiciary
Phil Mendelson, Chair
Council of the District of Columbia

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Good morning. My name is Robert J. Spagnoletti and I am the Attorney General for the District of Columbia. I want to thank Chairperson Mendelson and members of the Committee for the opportunity to testify on this legislation.

During the last session, the Council passed the Electronic Recording Procedures Act of 2004, which requires the Metropolitan Police Department to electronically record interrogations of persons suspected of committing certain dangerous and violent crimes, when such interrogations take place in police interview rooms. Pursuant to that law, if an MPD officer fails to record a statement, for any reason (even if the recording equipment malfunctions), the law automatically requires the judge to find that the statement is involuntary and therefore inadmissible. The only way this presumption of inadmissibility can be overcome is if the government can show by clear and convincing evidence that the defendant voluntarily made his statement. As you know, when I testified last year I strongly opposed this legislation.

Although the Office of the Attorney General supports the policy of electronically recording statements made by persons in custody when it is feasible to do so, we believe that this policy should be implemented by an MPD general order and not legislated. Recognizing that the Council takes a different view, I am here today to discuss why the alternative bill, B16-138, the "Electronic Recording Procedures and Penalties Act of 2005", is the favored approach.

First, let me begin by discussing what has transpired over the past few months and the significant strides made by MPD. The Metropolitan Police Department has already crafted and implemented a new General Order entitled Electronic Recording of Interrogations. This General Order is consistent with the recording requirements contained in the Electronic Recording Procedures Act of 2004. As Chief Ramsey promised, the General Order includes a penalty section which calls for suspension and termination for knowing violations of the law.

The Metropolitan Police Department, the Office of the Attorney General, and the Office of the United States Attorney for the District of Columbia formed a working group to address the implementation of the electronic recording of interrogations and other law enforcement issues. Members of this group conducted training sessions for all MPD detectives concerning the Electronic Recording Procedures Act of 2004 and the new General Order on Electronic Recordings of Interrogations. This group has also identified and begun planning further trainings for MPD officers surrounding proper and effective interrogation procedures and techniques. This General Order, along with the efforts of the working group, will achieve the goals of the Electronic Recording Act of 2004 by requiring MPD officers to record interrogations or receive harsh punishment.

Since the inception of the General Order issued on January 31, 2005, OAG's Juvenile Section has received over thirty (30) cases with video taped statements involving youth charged with dangerous and violent crimes. This is approximately four (4) times the number of video taped statements that the Juvenile Section received in a similar time frame prior to the implementation of the General Order. The section has also received three (3) cases where the detective placed a tape in the recorder and pushed record, but the machine malfunctioned and failed to record the interrogation. One of these cases involved a crime of violence committed with a firearm. I will discuss that case in more detail later in my testimony.

Before I discuss why B16-138 is the favored approach, let me briefly review my concerns regarding the current law.

The current law deems an unrecorded statement as involuntary and inadmissible. Under Constitutional law, there are two ways in which the issue of voluntariness comes up in the context of statements against penal interest. First, if a defendant was subject to custodial interrogation, he is entitled to be advised of his *Miranda*[1] rights for the prosecution to use any statements against him in its case-in-chief. Among those rights is, of course, the right to remain silent. A defendant who was read his rights and waived them may challenge that waiver as involuntarily. The second way in which voluntariness may be raised would be for the defendant to assert that the statement itself was taken under circumstances that were coercive, thus in violation of his right to due process.[2] Under both applications, the issue of voluntariness is based on the notion that a defendant's free will has been overcome by some measure of coercion.

By rendering an unrecorded statement as involuntary, the Electronic Recording Procedures Act of 2004 imposes a burden and penalty well beyond that required by the United States Constitution. And while the Council has the authority to do so, it should not be done lightly or without compelling reasons given the severe implications of presumptively precluding the use of otherwise constitutionally sound evidence. There is a tremendous body of case law that guides our Judges every day in deciding what is and is not coercive and no single factor—particularly the absence of a recording of the statement—should *de facto* render a statement coercive. Indeed, the Supreme Court has observed that within the wealth of case law examining the notion of voluntariness, "[t]he significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances."[3] To establish a rule that presumptively deems unrecorded statements as involuntary defies the well-settled Constitutional principle that the totality of the circumstances of each case must be carefully examined before the very extreme measure of presumptively excluding evidence is imposed.

Under the Electronic Recording Procedures Act of 2004, the only way to avoid this severe penalty is for the government to rebut the presumption through clear and convincing evidence. This places an extremely high burden on the prosecution—again, one which is not constitutionally mandated. "Clear and convincing evidence is most easily defined as the evidentiary standard that lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt."[4] Under existing constitutional law, the government is only held to a preponderance of the evidence standard when a motion to suppress evidence on voluntariness grounds is raised. Therefore, under the Electronic Recording Procedures Act of 2004, the government must now provide more evidence to the court than it must in a motion based on a constitutional violation in order for a statement to be admissible.

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[1] *Miranda v. United States*, 384 U.S. 436 (1966).
[2] *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).
[3] *Schneckloth v. Bustamonte*, 412 U.S. at 226.
[4] *In re J.M.C.*, 741 A.2d 418, 423 (D.C. 1999) (citations omitted).

In my thirteen years as an Assistant United States Attorney, and now, in my nearly two years as the Attorney General, I have been involved in or supervised the prosecution of thousands of criminal cases in the District of Columbia. Thus, I can say with much confidence that the existing legal standards, including the Constitutional requirement that the prosecution demonstrate by a preponderance of the evidence that a statement was voluntary,[5] are effective in both protecting defendants and deterring coercive conduct by the police. Accordingly, the presumption of involuntariness, and the clear and convincing standard required under the Act to overcome this presumption, is unnecessary. Indeed, while we certainly recognize that recording witness statements is a best practice, it is hard to understand why the Council would want to impose such a severe penalty for failing to do so when there is no evidence to suggest that the District has a problem with coerced confessions.

While I recognize that violations could occur, there are numerous safeguards, including the existing Constitutional standards, to protect against such evidence being used. Each and every day throughout the Superior Court the Judges hear such motions and, through full evidentiary hearings, carefully scrutinize the actions of our law enforcement officers. A careful review of the particular facts of each case is undertaken by the Judges to ensure that even the most subtle of differences in circumstances is considered. In these motions, the prosecution must convince the Court, by a preponderance of the evidence, that the statement was voluntary.

The scrutiny does not stop there, however. Indeed, even if the statements made during an unrecorded interrogation are not suppressed by the Judge, juries act as an additional mechanism through which the reliability, accuracy, and voluntariness of such statements are screened. Defense counsel can, and do, cross-examine police witnesses on the accuracy of those unrecorded statements, and are free to argue that jurors have nothing but the officer's uncorroborated memory on which to rely. Jurors are instructed by the Judge to carefully scrutinize whether such statements were made and assign them the weight that they deserve in light of the evidence of the surrounding circumstances.[6] Moreover, juries must apply the highest standard of all in the law – beyond a reasonable doubt. Finally, trial court decisions are subject to review by the Court of Appeals, providing even greater assurance that any potential missteps along the way can be remedied.

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[5] *Hawkins v. United States*, 304 A.2d 279, 282 (1973).

[6] Instruction 2.48 of the Criminal Jury Instructions for the District of Columbia (4th Ed. Revised 2002) reads:

"Evidence has been introduced that the defendant made statements to the police about the crime charged. You should weight such evidence with caution and should carefully scrutinize all the circumstances surrounding the making of the statement. Do this in deciding [whether the defendant made the statement and] what weight to give it, along with all the other evidence, when deciding the guilt or innocence of the defendant.

[If you decide that the defendant did make the statement,] in examining the circumstances surrounding the statement, you may consider whether the defendant made it freely and voluntarily with an understanding of what s/he was saying. You may consider whether s/he made it without fear, threats, coercion, or force, either physical or psychological, and without promise of reward. You may consider the conversations, if any, between the police and the defendant. For example, you may consider whether the police warned him/her of his/her rights; where and when the statement was given; the length of time, if any, that the police questioned him/her; who was present; the physical and mental condition of the defendant. You may consider the age, disposition, education, experience, character, and intelligence of the defendant. Considering all the circumstances, you should give his/her statement such weight as you think it deserves."

As a prosecutor I would like nothing more than the certainty that comes with recorded statements. The strongest case is the one where the crime, the confession and all witness statements are recorded. I believe that there is strong evidence based on what we have seen since January of this year to support the notion that MPD is fully committed to making recorded statements the norm. The Chief, the U.S. Attorney and I all committed to this when our Offices testified last year, and we have done so. Thus, while I still maintain that legislation is not necessary and that the new General Order is bringing about the very outcome that the Council intended, if the Council is determined to legislate in this area, I would support the passage of B16-138, the "Electronic Recording Procedures and Penalties Act of 2005" as the more appropriate alternative.

A recent case presented to my Office illustrates why B16-138 is the better approach than that which was adopted in the Electronic Recording Procedures Act of 2004. In this case, a youth fired several shots at members of a rival gang. One of these shots struck the victim, another juvenile, in the leg. Detectives from the Metropolitan Police Department identified a juvenile as the suspect in the case. The suspect called the officers and said that he heard they were looking for him, and he wanted to turn himself in and talk to them. The juvenile proposed a time and location to meet. The officers agreed and met the juvenile. They all went to the station and entered an interview room. The officers placed a video tape in the recorder and hit the record button. The juvenile then waived his *Miranda* rights and signed a "rights card," indicating that he wanted to talk to the police. The juvenile then informed the officers about the reason for the shooting, the type of gun he used, where he got the gun, how much he paid for the gun, where he put the gun after the shooting, and other circumstances surrounding the shooting. The officers went back to their station to make a copy of the tape. When they put the tape in, they found out that the tape was blank. The officers then prepared a detailed documentation of the confession and the steps they took in an effort to record that confession. The interview took place within an hour of the arrest. This youth had prior contacts with the criminal justice system and was currently under court supervision.

Under the Electronic Recording Procedures Act of 2004, the judge must presume that this statement was involuntary, which by constitutional jurisprudence means that the officers used some measure of coercion in obtaining the confession. The judge would have to make that determination even though the case law provides that the court should consider all the surrounding circumstances and despite the fact that no coercion was actually involved.

When reviewing the surrounding circumstances the court would look at the fact that the juvenile "turned himself in" and agreed to talk; the fact that juvenile waived his Miranda rights and signed the card indicating that he wanted to talk to the police; the fact that the interview took place within one (1) hour of his arrest; the fact that the juvenile had prior contacts with the criminal justice system and was familiar with the process; the juvenile's age; the fact that it was one o'clock in the morning; and, the fact that the statement was not recorded by the officers. However, the Electronic Recording Procedures Act of 2004 throws away the careful, detailed analysis by the court and, instead, makes the voluntariness decision turn on a single factor – that the statement was not recorded. Instead, the current Act now ties the judge's hands and prohibits him from considering any of these other factors in making an initial voluntariness determination. Not only does the law discard the totality of the circumstances analysis, it then

requires the government to prove by clear and convincing evidence that the statement was voluntarily given. Moreover, the Act entirely fails to account for the fact that the lack of a recorded statement was entirely accidental.

While the government will struggle with the presumptions and the burdens, the persons most affected by this legislative change will be the victims of crimes. Let's be clear, the Electronic Recordings Procedures Act of 2004 would presumptively prevent the government from using a confession simply because that statement was not recorded. It will be lost on a victim of a violent rape as to why the Council chose to preclude the use of her assailant's confession simply because that confession was not recorded. Certainly, it is the officer's responsibility to record the statement, and the officer should be held accountable for knowingly failing to do so. But prohibiting the government from using the statement will only serve to punish victims and the community. We believe that is unnecessary and unfair. It serves neither the victim nor the public at large to prevent the government from using constitutionally sound evidence. If the aim of this legislation is to encourage better police procedures – as opposed to preventing a constitutional wrong - then the sanctions for non-compliance should be directed at the individuals who are in control of the procedures.

Should the Council statutorily mandate the electronic recording of interrogations, the Council should adopt B16-138, which, instead of presumptively excluding the evidence, imposes sanctions on officers who knowingly fail to record statements. The sanction provision does not affect the Constitutional voluntariness analysis. The court would continue to apply the current constitutional standards to conduct a voluntariness analysis when the circumstances of a case warrant such review.

If the Council is inclined to maintain an evidentiary control provision, then we would urge you to amend section 103 of the current Act to eliminate the presumption that a statement made in contravention to the recording requirements was made involuntarily, and instead, substitute a provision which allows the Court to consider the failure to follow recording requirements as a factor in a motion to suppress a statement on the grounds that a *Miranda* waiver was involuntary[7] or that the statement itself was not voluntarily made. This would resolve our concern that the law establishes an arbitrary and unjustified basis on which to render an entire category of statements involuntary, would permit the existing Constitutional standards to be applied, and would require that the court consider the fact that the statement was not recorded. In addition, section 103 should also be amended to address the legal impact of equipment failure and the inadvertent loss of, or damage to, a properly made recording. I suggest that Section 103 include the following language:

[7] Additionally, the legislation should not alter the existing Constitutional standard whereby a finding of involuntariness of a *Miranda* waiver should only limit the government from using the evidence in the government's case-in-chief. The government should be able to use these statements as rebuttal evidence if the suspect testifies at his trial. A suspect must not be allowed to perjure himself in reliance on the government's inability to challenge his credibility. The Supreme Court's holding in *Harris v. New York*, 401 U.S. 222, regarding statements taken without giving *Miranda* warnings is equally applicable to non-electronically recorded statements under this Bill. "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris,* 401 U.S. at 225.

"It shall not be considered a violation of Section 2 if:

(1) a law enforcement officer in good faith believes that an interrogation is being recorded and despite this good faith belief the interrogation is not, in fact, recorded, or
(2) the required recording is inadvertently lost or damaged."

I appreciate the opportunity to testify today and I would ask that my written testimony be incorporated for the record. I am happy to answer any questions.